NO. 83-734

In the Supreme Court of the United States

OCTOBER TERM, 1983

BAYOU DES FAMILLES
DEVELOPMENT CORPORATION,

PETITIONER,

V.

UNITED STATES CORPS OF ENGINEERS,
UNITED STATES DEPARTMENT OF THE
INTERIOR, and UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case, we believe, for the first time squarely presents the issue whether, if in the exercise of its permit authority pursuant to the Rivers and Harbors Appropriations Act of 1899, § 10, 33 U.S.C. § 403 (hereinafter RHA), and the Federal Water Pollution Act, § 404, 33 U.S.C. § 1251, renamed Clean Water Act (hereinafter CWA), the Corps of Engineers completely destroys the economic usefulness of private property, a Fifth Amendment violation of 'due process' or 'just compensation' occurs.

The specific questions presented in this litigation are:

FIRST: With respect to the permit action of the Corps of Engineers:

Petitioner is the owner of real property in Jefferson Parish, Louisiana, and was proceeding with State and Municipal regulatory approval to develop it by the erection of a levee and "plugging" a man-made canal when (a) the work was halted by the Corps of Engineers and (b) its 'after the fact permit' was denied. With respect to the jurisdiction and action of the Corps of Engineers the following questions are presented:

(1) Did the Corps of Engineers have initial jurisdiction over Petitioner's land when it issued its cease and desist order? If so,

(2) Does the Fifth Amendment provide injunctive remedy to a property owner where in the execution of its permit power under the Rivers and Harbors Act (RHA) and/or the Clean Water Act (CWA), the Corps of Engineers

renders the property owner's land valueless, or does such action constitute a Fifth Amendment taking without just compensation?

(3) Did the administrative action of the Corps of Engineers violate the due process provisions of the Fifth Amendment where (i) the decision was predicated on regulations which were issued after the application was filed; (ii) its decision was delayed for approximately four years after it was in posture to decide; (iii) both the delay and the decision were influenced by the efforts of the Corps to accommodate its own decision on peripheral matters, i.e. the location of a hurricane protection levee and the needs of the Department of Interior with respect to Jean Lafitte Historic Park; (iv) the permit denial was inconsistent with two other decisions by the Corps of Engineers involving the same issues and comparable land; and (v) is not supported by the weight of its own holdings applying its own criteria? Or, if not a violation of due process

(4) Do these factors constitute grounds for judicial reversal of the decision of the District Engineer on the ground that it was arbitrary and capricious so that injunctive relief should issue?

(5) Does this action constitute a taking without just compensation in contravention of the Fifth Amendment?

(6) Did the United States District Court, having jurisdiction over the property and the parties and the clear right and jurisdiction to determine whether the alleged Fifth Amendment due process violations had occurred and grant injunctive relief, have the pendent jurisdiction to determine, if it denied injunction, that the actions complained of constituted a Fifth Amendment taking without

just compensation?

SECOND: With respect to the Jean Lafitte Park:

On November 10, 1978, Congress created the Jean Lafitte Historical Park, delegating its administration to the Department of Interior and granting the Department of Interior the right to create a Core Area containing about 8,000 acres (which constituted the Park itself) and a Park Protection Zone (PPZ) of about 20,000 acres. Approximately 151 acres of Petitioner's property was included in the Core Area, and 1,800 acres in the Park Protection Zone.

(1) The statute provided that the Department of Interior "shall" establish guidelines for the PPZ within six (6) months after enactment of the statute. Since these guidelines were not established within the 6-month period, is Petitioner entitled to injunctive relief on the ground that the use of the word "shall" was mandatory and, therefore, the Department of Interior had no further right to issue guidelines?

(2) However, if it is determined the Department of Interior has the right to issue guidelines, despite the language of the statute, then does the Park Protection Zone, as described in the statute and as governed by the guidelines proposed by the Department of Interior, in fact, constitute an extension of the Core Area; thus, a Fifth Amendment violation by the taking of property without due process?[1]

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[1] When this suit was instituted, Petitioner further complained it should recover for the Core Area on the grounds that the delay of taking had deprived Petitioner of its land without compensation. Meanwhile, the process of condemnation has commenced, appraisal completed, and offer to acquire submitted, and this issue dismissed without prejudice.

LIST OF INTERESTED PARTIES

Petitioner is Bayou des Familles Development Corporation, a Louisiana corporation, whose shareholders are Wilson P. Abraham, George Ackel, Sam J. Gattuso, James E. Hennessey, Charles Kornman, B. H. Miller, Succession of Julius Rosenblum represented by his son, Paul Rosenblum, and James Trotter.

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UNITED STATES CORPS OF ENGINEERS,
UNITED STATES DEPARTMENT OF INTERIOR,
and UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bayou Des Familles Development Corporation, plaintiff in the District Court and Appellant in the Fifth Circuit Court of Appeals, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit rendered on June 23, 1983, rehearing denied on August 8, 1983.

OPINIONS BELOW

The opinion of the District Court is reported under the caption *Bayou Des Familles Development Corporation v. U.S. Corps of Engineers, et als,* was rendered on April 20, 1983, and is reported at 541 Fed. Supp. 1025 (Appendix B, Item 1).

The United States Court of Appeals for the Fifth

Circuit affirmed the District Court on June 23, 1983. This opinion is not reported (Appendix B, Item 2).

The Petition for Rehearing was denied on August 8, 1983 (Appendix B, Item 3).

JURISDICTION

The judgment of the U.S. District Court was rendered on October 23, 1981 and entered October 27, 1981.

The judgment of the Court of Appeals for the Fifth Circuit was rendered June 23, 1983 and entered August 22, 1983. The Petition for Rehearing was denied on August 8, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(F).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

(2) Jean Lafitte National Historic Park Act, 16 U.S.C. § 230, P.L. 95-625 §§ 901, 902 (Appendix A, Item 1).

(3) 33 C.F.R. §§ 322.4(g), 323.3(a), 323.4-1 (Appendix A, Item 2).

(4) 33 C.F.R. §§ 209.260(g)(1), (k)(ii)(2), Engineering Regulation 1165-2-302 (1972) (now repealed, published at 37 Federal Register 176, pp 18289-18292, September 9, 1972) (Appendix A, Item 3).

STATEMENT

During 1973 Bayou Des Familles Development Corporation, Petitioner, acquired approximately 2,500 acres of unimproved land in Jefferson Parish, Louisiana, intending to develop it for residential and commercial uses. Following well established procedures and practices, it applied for and obtained the approval of the appropriate local authorities to levee the property and install a pumping station to provide drainage. In the course of its approval procedure, the Jefferson Parish authorities called the Petitioner's attention to a levee line which had been proposed by the Corps of Engineers for a hurricane protection levee for this area. Engineering and environmental studies had been completed, and a public hearing scheduled on the Corps' levee. Petitioner then relocated its levee line from the boundary of its property to adopt the line proposed by the Corps of Engineers, which required Petitioner to obtain easements from other property owners since the Corps' location included property of other owners as well as Petitioner's.

In the process of obtaining local approval, the Jefferson Parish authorities on August 12, 1973 transmitted the plans and specifications for the Petitioner's levee and for the proposed work to the Corps of Engineers, and on October 9, 1973, received this reply from Frederick M. Chatry, Acting Chief, Planning Division of the Corps (Appendix B, Item 4):

> "5. The Bayou des Familles levee...if built...as specified in the construction drawings...and if properly maintained will provide protection against hurricane produced stages on the order of once in a hundred years or better...."

Nevertheless, on October 29, 1973, 60 days after the parish letter and 20 days after the Corps' reply thereto, the then District Engineer, apparently completely unaware of his department's receipt of the Petitioner's plans and their approval by Chatry, wrote Petitioner that: "Based on the definition of navigable waterways published in the Federal Regulations on 9 September 1972, a permit ... may be required for this construction..." and requested copies of the plans.[2] After communications between Petitioner and the Corps, the District Engineer ordered the work to cease on the ground that Petitioner had to obtain a permit to plug the man-made canal which dead-ended on its property (the Kenta Canal), contending that it was a navigable waterway; he further subsequently determined that the levee work also required a permit because Petitioner's land was below the level of the extended "plane of the mean high-tide" measured at a gauge at Barataria Bay seven (7) miles

[2] Examination of Chatry's letter, will show that a copy of this letter with five enclosures including the plans and specifications were sent to Mr. Decker. This is the same Charles Decker referred to in the District Engineer's letter as the person to whom Petitioner should reply.

miles away, and was therefore wetlands. The regulations relied on provided as follows:

> "...A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce." (Appendix A, Item 3)

After cease and desist proceedings were completed, Petitioner applied for an after the fact permit on April 7, 1975. At this time, the pumping station was finished and the levee ninety percent completed. The Kenta Canal was not plugged.[3] According to the Corps' records, it was ready to render a decision on the permit application on December 10, 1975 (Appendix B, Item 5). However, the decision denying the application was not rendered for about four years, on September 17, 1979.

The effect of this decision was to render the land absolutely useless for any purpose.

The delay was caused by two unrelated government matters: (1) The action to create the Hurricane Protection Levee which had been relied upon by Petitioner in 1973, had been abruptly halted for fiscal reasons; it was renewed after the application was filed, and in 1978, the Corps selected a new levee line different from the 1972 line which Petitioner followed. (2) Meanwhile, Congress had enacted the Lafitte Park legislation. The Department of Interior, to control the area to be included in the PPZ, took an assertive

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[3] Petitioner's plans originally called for plugging Bayou Boeuf, a small natural body of water. These plans were abandoned and the Corps so notified, and Bayou Boeuf plays no part in this litigation, although it is contended that Bayou Boeuf was actually plugged. This is not conceded, but what is established is that Bayou Boeuf on Petitioner's property at the most is six inches deep only after flooding rains.

and aggressive part in the permit procedure to be certain the PPZ boundary and the Hurricane Levee Line would coincide, and that the permit would be denied.[4] Both of these factors weighed heavily (as the District Court determined) in the Corp's decision making process, both with respect to delay and the ultimate result.

Promptly after the denial of the permit, plaintiff instituted this suit in the United States District Court seeking injunctive relief on the ground that, individually and collectively, the action of the Corps of Engineers and the Department of Interior deprived Petitioner of its property without due process of law in violation of the Fifth Amendment, or in the alternative, constituted a taking without just compensation in violation of the Fifth Amendment. The Court below, misconstruing plaintiff's constitutional arguments as an attack on the RHA and CWA *per se*, dismissed the due process claim seeking injunction, and declined to consider the alternate argument of just compensation on jurisdictional grounds, holding jurisdiction was vested solely in the Court of Claims under the Tucker Act.

While the permit application was pending, the Department of Interior prepared a final draft of its guidelines and submitted these to the Parish of Jefferson, which refused to act on them. The guidelines, when construed in the light of the statute itself, make the PPZ

[4] Petitioner has contended that the combined action purported to increase Lafitte Park from 8,000 acres to 28,000 acres, and in so doing, prevent proper recovery by Petitioner for the property taken in the Core Area and the PPZ. Although not in the record and having occurred since this case was decided by the Fifth Circuit, this position is borne out by the appraisal by the Department of Interior's appraiser, who relied on the "uselessness" of Petitioner's acreage in the Core Area as a result of the Core's permit denial, and found its use "recreational only" and thus of minimal value.

nothing other than an extension of the Park. They effectively prevent any viable use of Petitioner's property.

With respect to the action of the Department of Interior, Petitioner has contended that the language of the statute mandated that guidelines be issued within six (6) months after the effective date of the Lafitte Park Act, or if not, then to establish a PPZ, the Department of Interior was required to acquire the property by exercising the right of eminent domain. Since six (6) months had elapsed and the guidelines had not become official, injunctive relief against their future issuance was sought. In the alternative, in the event the guidelines could be issued, Petitoner contended that the statutory definition of the PPZ, when construed with the final draft of the guidelines of the Lafitte Park Statute, clearly deprived Petitioner of any use of its land whatsoever, and therefore was an unconstitutional taking.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction in the U.S. District Court was asserted under 28 U.S.C. § 1331, and 5 U.S.C. §§ 702, 703, 704 and 706.

ARGUMENT

It appears that thus far Petitioner has been unable effectively to present its constitutional arguments. Petitioner does not contend, as the Court below perceived, that the RHA and CWA are *per se* unconstitutional statutes. To the contrary, Petitioner contends that in the administration of the permit authority granted the Corps of Engineers by these statutes, the Corps exceeded its authority in that its actions were, in effect, confiscatory and, accordingly,

constituted a violation of due process for which injunction is the proper remedy, or constituted a taking of private property for public use without just compensation, and Petitioner is therefore entitled to recover "just compensation" for its property.

Nor does Petitioner contend that Congress does not have the power to create the Jean Lafitte Park and that it cannot "take the Core Area". However, Petitioner does contend that the Department of Interior does not have the right to create a Park Protection Zone with such severe restraints on its use that it is nothing more than an extension of the Park itself; this action destroys the entire value of Petitioner's properties, and thus affords Petitioner the relief sought.[5]

These contentions are based upon the language of this court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n. 5 (1974) where this time-honored language was quoted:

> "There cannot exist under the American Flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States."

In 1980, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), it was held that a government regulation effected a taking if it "denies an owner economically viable use of his land." See also *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890); *Penn Central Transportation Co. v.*

[5] The Federal defendants did not contest this contention and the evidence to the effect that the viability and use of Petitioner's property was completely obliterated by the actions complained of, and the Court below so held.

City of New York, 438 U.S. 104. Petitioner's property clearly met the test of "destruction of its use or economic value" as a result of Federal defendant's non-judicial actions. (Testimony of Isenogle, Department of Interior, pages 110-113, 114-118, 123-127; Exhibit Plaintiff 37, Pages 85-90; Appendix B, Item 6). After declaring that "...this Court has never held that the navigational servitude creates a blanket exception to the taking clause...," after reviewing three major factors in the taking evaluation, the Court held on the facts before it, as we contend in this case, that the government's action went so far beyond ordinary regulation as to amount to a taking. See *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

The pivotal factor which permeates these entire proceedings has also been overlooked—we are not dealing with a single instance of the exercise of the authority of either the Corps of Engineers or the Department of Interior, but an artificial accumulation of concerted action by these two administrative agencies to remove Petitioner's property from private hands and make it a part of the public domain.

This far exceeds the constitutional standards laid down by this court in *Penn Central Transportation Co. v. City of New York, supra*, and on the facts is distinguished from *Jentgen v. U.S.*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. den.*, 455 U.S. 1017, and *Deltona Corp. v. U.S.*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. den.*, 455 U.S. 1017. The circumstances in the instant case are analgous to the factual situations which led to the determination of a Fifth Amendment violation in the avigational easement cases in which the right to recovery was predicated on the extent of governmental encroachment. *Peabody v. U.S.*, 231 U.S. 530 (1913); *U.S. v. Causby*, 328 U.S. 256 (1946). For this reason, the facts of this case are emphasized to show the causation

of complete loss by the excesses of the Federal defendants.

Accordingly, petitioner has vehemently and consistently contended that the constitutional questions presented are real, serious and meritorious; that, therefore, the court below not only had the right, but the obligation, to determine whether Petitioner's Fifth Amendment rights to either due process or just compensation had been violated.

The threshold issue addressing itself to the exercise of the permit power, is directed to the means in which it was enforced, clearly demonstrating an abuse of the administrative power. First, it must be kept in mind that this was the initial instance of enforcement of the RHA or CWA in Louisiana.[6] Secondly, we emphasize that the District Engineer did not know or completely ignored the simple fact that his planning department had received and examined the plans and specifications for Petitioner's levee and pumping station, and advised the parish authorities that if completed according to these plans and specifications, the Bayou des Familles levee would meet the Corps' own requirements for 100-year hurricane protection, and was being built at a location and meeting requirements which had been prescribed by the Corps itself.

Not only was the District Engineer not cognizant of the proceedings in his own department, he didn't know his own regulations. It has never been denied that the District Engineer advised the Petitioner's counsel that the Kenta

[6] There is annexed the order of the District Court in *Orleans Audubon Society v. Col. Robert E. Lee*, not reported, wherein the Court held that a permit was not necessary because of a "nationwide permit" created by 33 CFR §§ 322.4(g) and 323.4-1(a), which applied to work commenced prior to July 25, 1974 (Appendix B, Item 7).

Canal, being a man made body of water, would only be considered navigable if it connected two navigable bodies of water, and that, in fact, it did not meet this prerequisite. The regulation which he cited provided a man-made canal open on one end was navigable water, if in fact, it was used in navigation. Once provided evidence that the Kenta Canal did not connect two navigable bodies of water, and despite an opinion of district counsel that the canal was not in fact used in interstate commerce (Appendix B, Item 8), the District Engineer nevertheless determined that the Kenta Canal was a navigable body of water for permit purposes in 1973.[7] However, the District Engineer determined in 1979 that blocking the Kenta Canal would have no effect on navigation.

The District Engineer was not certain the CWA applied. If the District Engineer didn't know, how could the Petitioner be presumed to know? Applying the principle that Petitioner's land was below the "plane of the mean, high tide", he classified it as 'wetlands', subject to CWA permit regulations. The regulation then in effect did not say "reached" by the mean high tide, but said "inundated" by it.[8] There is nothing in the administrative record to show that the land is inundated. To the contrary, the Chatry letter says the tide on the property is from rainfall

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[7] The language of the 1972 regulation referred to by Col. Hunt in his correspondence and applicable to navigable waters reads as follows:

33 C.F.R. § 209.260(g)(1), E. R. 1165-2-302, "A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce."

[8] 33 C.F.R. §209.260(k)(ii)(2), E. R. 1165-2-302 says: "Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action..." [however] "Marsh lands and similar areas are thus considered 'navigable in law,' *but only so far as the area is subject to inundation by mean high waters.*" (Emphasis ours)

only, and the only tidal data in the administrative record seeks to establish that, theoretically, the hypothetical 'plane' of the level of the mean high tide at a measuring post seven miles away, if extended from the coastline, would be above portions of Petitioner's land—it clearly does not show inundation. Over objection of Petitioner, expert witnesses were permitted to state that in their opinion the land was saturated and therefore "inundated".[9] They did not find the land covered by the tide. The record shows that the average tidal variance was only .25 a foot, i.e. three inches, a fortiori for this land to have been inundated it would be permanently covered. Nevertheless, none of this was relevant because in the regulations in effect in 1979, what has been characterized as a "nationwide permit" provided that the CWA wetland regulations would not apply to first offenders who began work before July 25, 1974, thus clearly exempting Petitioners.[10]

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[9] Subsequent regulations broaden the scope of the jurisdiction of the Corps of Engineers both with respect to RHA and CWA. In reaching its decision in 1979, the District Engineer applied the subsequent regulations. We urge that this was an improper application and that there was no right to apply subsequent regulations where in fact they negatively affected property rights, and that accordingly, retroactivity was not a proper application, and in support of our contention, cited *inter alia Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936); *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947); *Green v. U.S.*, 376 U.S. 149 (1964); *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). We have by no means abandoned this argument, advise the Court of it so it knows of its existence, and if writs are granted, will urge this as another element of error in the courts below.

[10] 33 C.F.R. §§322.4(g) and 323.4-1(a) create the nationwide permit exemption and provide that "structures or work completed before 18 December 1968, or in waterbodies over which the District Engineer has not asserted jurisdiction, provided there is no interference with navigation..." and commenced prior to July 25, 1975, are not subject to the permit requirement. This is the regulation applied by the Corps in the *Orleans Audubon* case, *supra*.

On October 30, 1975, General Kenneth E. McIntyre, Corps of Engineers, in connection with what is characterized as the "V" levee (which is across the highway and further south than the property in question) ruled that hurricane protection as more important than the environmental consequences and ordered the permit for the "V" levee issued.[11] The District Engineer, even though of the eight elements considered, five were in favor of Petitioner, completely ignored the prior decision of General McIntyre, decided this case upon (a) the environmental issues and (b) the accommodation of the Department of Interior for the Park Protection Zone and denied the permit while at the same time in *Orleans Audubon, supra,* was granting a permit based on the 'nationwide permit' in very similar circumstances.

Of course we cannot quarrel with the authorities cited by the Appellee that the interpretation of a regulation by the administrative authority is entitled to great weight. We are not attacking the interpretation of the regulations. We are attacking the application of the regulations, based upon the basic constitutional concept that they must be applied uniformly, without discrimination, and without an abuse of administrative authority.

By way of summary, therefore we urge that it is abundantly clear from this record that these are excesses of administrative procedure and accordingly, Fifth Amendment violations, or at the very least, basis for overturning the administrative action as arbitrary and capricious:

1) According to its own interpretation of the regulations, in 1973 the Kenta Canal was not a

[11] Administrative record, Exhibit A, Part S, the letter from McIntyre to Meyers, dated October 30, 1975.

navigable body of water and the action of the District Engineer in asserting RHA authority was in violation of its own regulations.

2) The application of the CWA on the basis that the land was below the extension of the hypothetical plane of a mean high tide, in light of the unequivocal language of the regulation that the land must be inundated by the high-tide, clearly demonstrates that in 1974 the Corps did not have jurisdiction under the Clean Water Act. This is confirmed and ratified by the Corps' own regulations subsequently enacted exempting first applicants under a nationwide exemption which ran until July 25, 1975.[12]

3) The consideration by the District Engineer of the needs of the Hurricane Protection Levee and the Park Protection Zone as factors weighing on the permit application is an abuse of authority. The criteria are prescribed by the regulations themselves, and such considerations are not among them, 33 CFR §§ 320.4(a)(2), 320.4(b).

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[12] The relevance of this is further confirmed by the concession of the Corps of Engineers at the trial that the gauge which was utilized to determine the level of the high tide was located at Bayou Barataria, some 7 miles away, and was in error. It appears that the level of the mean high tide was not 1.5 feet Cairo Datum, but 8.5 feet Cairo Datum. This would mean that a tide of approximately 10 inches would have to cover land 7 miles away from the shoreline where the tide fluctuated. The subsequent findings of the Corps' expert, admitted into evidence over the objection that it was not a part of the administrative record, was that because the water had saline content the land was "inundated" was clearly not supported by fact. The land is surrounded on three sides by heavy concentration of salt water, all of which is from 5 to 7 miles away; the land itself consists of, according to the Corps of Engineers' own testimony (also admitted over objection) land which was built up in this area from tidal overflow, and the water table itself is extremely high as it was in New Orleans before drainage was instituted. There is no evidence that this land is covered by the high tide, except in the rare instances of hurricane or flood.

4) Criteria are specified for the determination of permit approval or rejection. Of the eight standards considered by the District Engineer, five were decided in favor of Petitioner and three against. Frankly, the only one considered was the environmental factor.[13]

5) The inconsistent permit rulings by the Corps of Engineers in the only *two* instances of record: The "V" levee across the highway and south of this property (McIntyre letter, Exhibit A, Part S) and the granting of the permit in *Orleans Audubon*.[14]

With respect to Lafitte Park, we commend the Court to the broad language of the enabling statute (Appendix A, Item 1) as to the purpose of the PPZ guidelines.

Pretermitting the issue whether the statute confined the Department of Interior to six months to promulgate guidelines, repetitious though it is, we must reiterate our position that whereas Congress has the right to create a park, it cannot by the device of a protection zone, do indirectly what it cannot do directly, and by legislative and

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[13] There are two interesting points in this connection. First, in selecting its original line upon which the Petitioners built their levee, the Corps had already weighed the environmental factors and found that hurricane protection was more important than the miniscule effect on the environment of this levee, and now, it appears from the press, that the Corps is prepared to allow the completion of a levee along this levee line, provided that the Kenta Canal remains open, with flood gates which shall be closed in the event of flood or hurricane from the west.

[14] The decision rendered in *Orleans Audubon* was at approximately the same time as the decision rendered in the Bayou des Familles' case. In his letter dated June 7, 1979, the District Engineer refers to and bases his conclusion not to require a permit on the fact that there had been no prior enforcement of these regulations prior to January 1975, obviously referring to the case now before the Court.

administrative legerdemain, enlarge the Core Area through establishing a protection zone which differs in name only from the park Core Area.

CONCLUSION

We strongly urge that this Court is the last resort to do what the Fifth Amendment was meant to do, that is protect private property from predatory actions of the Federal government and its agencies.

The combined effect of the permit procedure requirements of the hurricane protection levee determination and its accommodation to the PPZ, and the nature of the Park Protection Zone statutes and guidelines, pose serious constitutional issues which the District Court had the right, if not the obligation to decide: (a) was this a taking of property without due process subject to injunction? Or, (b) if not, was this a taking without just compensation in violation of the Fifth Amendment, and if so, should the matter be remanded to the Court of Claims to determine "quantum"?

The District Court clearly had the authority to determine some issues with respect to the status of the PPZ, and we believe that our argument that the word "shall" was mandatory, was valid and, if not, the PPZ is clearly both a congressional and administrative taking of property without due process.

It is respectfully prayed that a Petition for a Writ of Certiorari issue herein and after due proceedings the decisions of the District Court and the United States Circuit Court of Appeals for the Fifth Circuit be reversed and

Petitioner be granted the relief sought.

Respectfully submitted,

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BY: _____
MOISE S. STEEG, JR.

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on the Solicitor General of the United States and all counsel of record in this proceeding by depositing a copy of same, duly addressed to each of them, in the United States Mail, First Class, postage prepaid, this 2nd day of November, 1983.

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APPENDIX "A"

Jean Lafitte National Historic Park Act, 16 U.S.C. § 230, P.L. 95-625, §§ 901, 902

Sec. 901. In order to preserve for the education, inspiration, and benefit of present and future generations significant examples of natural and historical resources of the Mississippi Delta region and to provide for their interpretation in such manner as to portray the development of cultural diversity in the region, there is authorized to be established in the State of Louisiana the Jean Lafitte National Historical Park and Preserve (hereinafter referred to as the "park"). The park shall consist of (1) the area of approximately twenty thousand acres generally depicted on the map entitled "Barataria Marsh Unit-Jean Lafitte National Historical Park and Preserve" numbered 90,000B and dated April 1978, which shall be on file and available for public inspection in the office of the National Park Service, Department of the Interior; (2) the area known as Big Oak Island; (3) an area or areas within the French Quarter section of the city of New Orleans as may be designated by the Secretary of the Interior for an interpretive and administrative facility; (4) the Chalmette National Historical Park; and (5) such additional natural, cultural, and historical resources in the French Quarter and Garden District of New Orleans, forts in the delta region, plantations, and Acadian towns and villages in the Saint Martinville area and such other areas and sites as are subject to cooperative agreements in accordance with the provisions of this title.

Sec. 902. (a) Within the Barataria Marsh Unit the Secretary is authorized to acquire not to

exceed eight thousand acres of lands, waters, and interests therein (hereinafter referred to as the "core area"), as depicted on the map referred to in the first section of this title, by donation, purchase with donated or appropriated funds, or exchange. The Secretary may also acquire by any of the foregoing methods such lands and interests therein, including leasehold interests, as he may designate in the French Quarter of New Orleans for development and operation as an interpretive and administrative facility. Lands, waters, and interests therein owned by the State of Louisiana or any political subdivision thereof may be acquired only by donation. In acquiring property pursuant to this title, the Secretary may not acquire right, to oil and gas without the consent of the owner, but the exercise of such rights shall be subject to such regulations as the Secretary may promulgate in furtherance of the purposes of this title.

(b) With respect to the lands, waters, and interests therein generally depicted as the "park protection zone" on the map referred to in the first section of this title, the Secretary shall, no later than six months from the date of enactment of this Act, in consultation with the affected State and local units of government, develop a set of guidelines or criteria applicable to the use and development of properties within the park protection zone to be enacted and enforced by the State or local units of government.

(c) The purpose of any guideline developed pursuant to subsection (b) of this section shall be to preserve and protect the following values within the core area:

(1) fresh water drainage patterns from the park protection zone into the core area;

(2) vegetative cover;
(3) integrity of ecological and biological systems; and
(4) water and air quality.

(d) Where the State or local units of government deem it appropriate, they may cede to the Secretary, and the Secretary is authorized to accept, the power and authority to confect and enforce a program or set of rules pursuant to the guidelines established under subsection (b) of this section for the purpose of protecting the values described in subsection (c) of this section.

(e) The Secretary, upon the failure of the State or local units of government to enact rules pursuant to subsection (b) of this section or enforce such rules so as to protect the values enumerated in subsection (c) of this section, may acquire such lands, servitudes, or interests in lands within the park protection zone as he deems necessary to protect the values enumerated in subsection (c) of this section.

(f) The Secretary may revise the boundaries of the park protection zone, notwithstanding any other provision of law, to include or exclude properties, but only with the consent of Jefferson Parish.

33 C.F.R. §§ 322.4(g), 323.3(a), 323.4-1

§322.4 Structures and work permitted by this regulation.

The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:

* * *

(g) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

§323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4-1, 323.4-2 and 323.4-3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands,

and into natural lakes, greater than 5 acres in surface area. (See also § 323.4-2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (See also § 323.4-2 for discharges that are permitted by this regulation.)

§323.4-1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a)(2) through (4) of this part are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) of this section, are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (see 33 CFR Part 329) that are part of an activity that was commenced before July 25, 1975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) of this section, are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraphs (a) and (b) of this section:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not occur in areas of concentrated shellfish production; and

(4) that the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, as identified under the Endangered Species Act.

33 C.F.R. 209.260(g), (k)

§209.260 Definition of navigable waters of the United States.

* * *

(g) *Improved or natural condition of the water body.* Determinations are not limited to the natural or original condition of the water body. Navigability may also be found where artificial aids have been or may be used to make the water body suitable for use in navigation.

(1) *Existing improvements: Artificial water bodies.* (i) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above; that is, whether the water body is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become

navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce.

(ii) The artificial water body may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area.

(iii) Private ownership of the lands underlying the water body, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used for purposes of interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private water body, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(2) *Nonexisting improvements, past or potential.* A water body may also be considered navigable depending on the feasibility of future use for interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement was "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely

reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

* * *

(k) *Geographic and jurisdictional limits of oceanic and tidal waters*—(1) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone 3 geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

(i) *Coast line defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of 3 geographic miles is measured. On the Pacific coasts the line of mean lower low water is used. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(ii) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. However, on the Pacific coasts, the line reached by the mean of the higher high waters is used. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably

averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(2) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (k)(1)(ii) of this section, "Shoreward Limit") of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to innundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

APPENDIX "B"

BAYOU DES FAMILLES DEVELOPMENT CORPORATION,
Plaintiff,

v.

UNITED STATES CORPS OF ENGINEERS, United States Department of the Interior, and United States of America,
Defendants.

Civ. A. No. 79-4324

United States District Court,
E.D. Louisiana.

April 20, 1982.

Developer of river front property sought declaratory and injunctive relief from actions by the federal government which had prevented developer from developing its property. The District Court, Cassibry, J., held that: (1) for purpose of establishing federal regulatory jurisdiction under the Rivers and Harbors Appropriations Act of 1899, the amount of tidal influence is irrelevant as long as a water body is in fact subject to the ebb and flow of the tide; (2) where property which developer intended to drain by means of construction of levee and pumping station was marshland inundated by mean high tide, Army Corps of Engineers had jurisdiction under Rivers and Harbors Appropriations Act of 1899 over property, and developer's failure to obtain a permit prior to construction of levee constituted a violation of permit requirements of Act; and (3) where development of area in question and resultant destruction of almost 2,000 acres of wetlands would result

in loss of wildlife habitat, loss of water purification and filtration benefits, and would have significant adverse impact on area fisheries resources due to loss of detritus contribution and habitat, Army Corps of Engineers did not abuse its discretion in denying developer's after-the-fact application for a permit to construct a levee and pumping station to facilitate development.

Order accordingly.

Moise S. Steeg, Jr., Robert M. Steeg, Carl J. Schumacher, Jr., New Orleans, La., for plaintiff.

Elizabeth Stein, Dept. of Justice, Washington, D.C., William F. Baity, Asst. U.S. Atty., New Orleans, La., for defendants.

CASSIBRY, District Judge:

Plaintiff seeks declaratory and injunctive relief from actions by the federal government which have prevented plaintiff from developing its property. Trial in this matter was held before the court without a jury in October 1981. After considering the pleadings, the voluminous administrative record, the testimony of the witnesses, the documents in evidence, and the law applicable to this case, the court finds in favor of the federal defendants on all claims.

FACTS

Plaintiff Bayou des Familles Development Corporation ("BDF") was formed in August 1972 as a real estate investment venture by several persons who planned to

develop and sell approximately 2,000 acres of land located on the West Bank of the Mississippi River in Jefferson Parish, about halfway between New Orleans and Barataria, Louisiana. Much of the property is cypress-tupelo gum swamp and marsh. BDF's development plan called for the excavation of a canal and construction of a levee and pumping station to drain the area. Portions of the property were to be filled for streets and construction of residences and other structures. The plan called for the blocking of Kenta Canal, a man-made waterway which extends into the subject property and connects at its southerly end with Bayou Barataria, a segment of the Gulf Intracoastal Waterway. The development plan also called for the blocking of Bayou Boeuf, a natural waterway that connects through the Bayou Segnette Waterway to the Gulf Intracoastal Waterway. Both Kenta Canal and Bayou Boeuf have direct hydraulic connections to the Gulf of Mexico and are subject to tidal influence.

The U.S. Army Corps of Engineers ("the Corps") has been involved in discussions concerning the possible construction of a hurricane protection levee in the vicinity of plaintiff's property since 1969. BDF designed its levee to follow the contour of one of the several alternative levee lines proposed by the Corps in 1972 for the West Bank flood control and hurricane protection project.

The federal laws authorizing construction of flood control projects require local assurances of cooperation, hold harmless agreements, and often require some local funding. 33 U.S.C. §§ 701c, 701f. While consultation with appropriate local authorities is important, the sole authority and responsibility for preparing a report recommending a specific project to Congress for approval and funding rests with the Corps. 33 U.S.C. § 701a-1.

BDF obtained the necessary permits from Jefferson Parish for construction of its levee and pumping station. In July 1973, BDF entered into a contract for the construction of a pumping station and sewage treatment plant. On August 16, 1973, BDF entered into a contract for the construction of a levee. The plans for the levee included the digging of a canal to the west of the levee line for fill and transportation of materials and equipment. Construction of the levee and canal system began in August 1973.

On August 21, 1973, Raymond Condon, Director of the Department of Drainage and Sewerage for Jefferson Parish, wrote a letter to Roy Farmer, an employee of the Corps of Engineers Planning Division, which referred to the BDF levee. The letter forwarded information about the specifications of the BDF levee pursuant to a request from the Federal Insurance Administration, Department of Housing and Urban Development. Mr. Farmer advised him that such a levee would meet certain Corps hurricane protection requirements.

The Planning Division of the Corps' New Orleans District ("NOD") has no authority over permitting or regulatory functions. That authority rests with the Permit and Statistics Branch, Operations Division, NOD, which first became aware of BDF's unauthorized dredge and fill work when review was requested of a report dated October 9, 1973. That report was being forwarded to the office of the Chief Engineer by the Planning Division and concerned reevaluation of base flood elevations for the Harvey Drainage Area in Jefferson Parish.

On October 10, 1973, the District Engineer wrote to Mr. Condon that the levee planned for the Bayou des Familles area might be constructed, in part, in wetlands

that were navigable waters of the United States, and requested Mr. Condon to furnish the name of the developer or contractor who was constructing the levee. On October 18, 1973, Mr. Condon advised the Corps to contact Wilson Abraham. A certified letter was sent the same day to Mr. Abraham, one of the BDF investors and developers, advising that work on the levee should cease immediately pending a determination as to whether a permit was required.

On October 20, 1973, a letter from the District Engineer was forwarded to BDF advising that its levee construction might require a permit based on the definition of navigable waterways published in the Federal Register on September 9, 1972, and that BDF should supply necessary information for use in determining whether a permit was in fact needed. Moise Steeg replied by letter dated November 8, 1973, requesting that all future correspondence be directed to him as legal counsel for BDF. Also on November 8, Mr. Abraham wrote to the engineering firm of Harris and Varisco, consulting engineer for the levee project, to comment on progress of the levee. He noted that the levee had sunk in many spots, and that the work was not proceeding as expeditiously as the contractor had committed to the previous month.

In January 1974 the Corps issued a cease and desist order to BDF, having heard nothing further from Mr. Steeg. The Corps informed BDF that it had determined that federal permits were required for construction of the levee and canal, including the closures of Bayou Boeuf and Kenta Canal, based on an on site inspection of the property by the Corps. The levee was approximately 90% complete at that time.

On March 8, 1974, the District Engineer wrote to

BDF to direct it to submit a permit application for dredging and filling already done and for work necessary to complete the project. BDF was advised that an Environmental Impact Statement ("EIS") would have to be prepared before final action could be taken on the permit, due to the potential environmental impact of the proposed project. 42 U.S.C. § 4332(2)(C). On April 4, 1974, BDF suggested to the Corps that by modifying its plans in such a way as not to block Bayou Boeuf, it could avoid Corps jurisdiction entirely. BDF also requested a temporary permit to complete the work already begun. The Corps advised Mr. Steeg that it had no authority to issue a temporary permit. Information before the Corps indicated that Bayou Boeuf had already been blocked.

In February 1975 the United States filed an enforcement action against BDF for violations of Section 10 of the Rivers and Harbors Appropriations Act of 1899 ("RHA"), 33 U.S.C. § 403. *United States of America v. Bayou des Familles Development Corporation*, No. 75-536 (E.D.La.). The proceeding was resolved through entry of a final judgment that required BDF to pay a civil penalty of $25,000 and to submit an after-the-fact application to the Corps within 60 days for all work already done within the "project area which was done below the elevation of mean high tide." The "project area" was defined as those areas within the project which were under the ownership of BDF on October 17, 1974. The elevation of mean high tide for purposes of the order was specified to be 1.5 feet above mean sea level.

On April 7, 1975, BDF submitted an after-the-fact application for the construction of a levee to enclose approximately 2,000 acres. The Corps issued a public notice of the proposed project on April 28, 1975, including its

determination that an EIS was required as part of the permit review process.

A draft EIS was submitted to the Corps, and revised in accordance with the Corps' comments. A public meeting on the draft EIS and proposed project was held on October 23, 1975. Numerous persons, several federal agencies and one state agency expressed objections to the project; some comments in support of the project were also given. The Corps received many letters in opposition to the project after the meeting as well. No responses to the public comments were sent to the Corps by BDF, although ample opportunity for response was provided.

The Corps' deliberations on plaintiff's permit application were influenced by the potential creation of the Jean Lafitte National Historical Park ("the park") in the vicinity of the subject property. Study of the feasibility of such a park had been funded by a specific congressional appropriation in August 1972. P.L. 92-369. On November 10, 1978, the park was established by act of Congress. 16 U.S.C. § 230. The park boundaries encompass part of BDF's property and extend over the levee built by BDF.

The provisions establishing the park call for the designation of a "core area" of approximately 8,000 acres and a "park protection zone" of 12,000 acres to serve as a buffer area between the core area and adjacent developments. P.L. 95-625, 16 U.S.C. § 230a(b). The Secretary of the Interior is authorized to acquire property within the core area, while uses in the park protection zone are to be regulated by local authorities pursuant to guidelines developed by the Secretary of the Interior in consultation with State and local authorities within six months of the enactment of the statute. If the State and

local authorities fail to enact or enforce rules regulating uses of properties in the park protection zone. the Secretary of the Interior is authorized to acquire real property interests in lands within the park protection zone to protect the values for which the park was established. *Id.* 16 U.S.C. § 230a(e). Numerous local agencies are involved in developing the guidelines; progress has been slow. To date, the Jefferson Parish Council has not approved the proposed guidelines. Over 1000 acres of BDF's property lies in the park protection zone.

On January 28, 1980, the Department of the Interior ("DOI"), through the National Park Service, informed BDF that DOI proposed to acquire a 151 acre tract for inclusion in the core area of the park. DOI has acquired more than 2200 acres in the core area, but has not yet begun negotiations with BDF for acquisition of its 151 acre tract. At the date of trial, funding for such acquisition was very uncertain.

Another influence on the Corps' processing of BDF's permit application was the continuing uncertainty about the placement of the West Bank flood control and hurricane protection levee. In May 1978 the Corps presented a number of proposals for the hurricane levee placement to the Jefferson Parish Council. Only one of the proposals presented to the Council followed the alignment of the BDF levee. In making the proposals, the Corps took into account the potential creation of the park, later realized in November 1978.

On September 17, 1979, the District Engineer wrote to the President of the Jefferson Parish Council to inform him of the Corps' decision to recommend to Congress a levee alignment which followed the park boundaries rather

than the BDF levee line. The levee alignment proposed by the Corps would generally provide protection to areas of the West Bank that have already been developed. The majority of the subject property, however, lies outside of the area that would be protected under the Corps' proposal. In developing the proposal, the Corps considered, among other factors, the potential impacts any hurricane levee would have on the newly-created park and upon the uses and values to be served and protected by the park.

Because the Corps has not yet received the necessary local assurances, the Corps has been unable to submit a final recommendation regarding the levee alignment to Congress for approval. Congressional approval and appropriations must be obtained before design and construction of the levee may begin. 33 U.S.C. § 701c.

Finally, after almost four years of deliberations and intervening events, on September 17, 1979, the Corps denied BDF's application for an after-the-fact permit. The District Engineer articulated the basis for his decision:

> I find that denial of the Department of the Army after-the-fact permit prescribed by regulations published in 33 C.F.R. 320 through 329 to Bayou Des Familles Development Corporation is based on thorough analysis and evaluation of the various factors enumerated above; that there are reasonable alternatives available that will achieve the purposes for which the work is being constructed; that the proposed work is not in accordance with the overall desires of the public as reflected in the comments of state, Federal, and local agencies and the general public; that the proposed work does not comply with established State and local laws regulations and codes; that

there have been identified significant adverse environmental effects related to the work; that the denial of this permit is consonant with national policy, statutes, and administrative directives; and that on balance the total public interest should best be served by the denial of a Department of the Army after-the-fact permit to Bayou Des Familles Development Corporation.

The Corps specifically considered the anticipated flood control benefits that would likely result from the project as well as the statements of officials of Jefferson Parish and others who favored the project. However, in weighing these benefits against the expected adverse environmental impacts of the work, the District Engineer concluded that the detriments outweighed the benefits.

On November 2, 1979, the instant action was filed by BDF against the Corps, DOI and the United States.[1] BDF seeks to enjoin the Corps' denial of its permit application, claiming that the Corps lacked jurisdiction over the subject property in 1973, and in the alternative, that the Corps failed to give proper weight to the flood protection provided by BDF's levee in denying the permit. Plaintiff also seeks to enjoin the Corps' recommendation of a levee alignment other than one following its own levee line. Finally, plaintiff seeks to enjoin DOI from issuing regulations covering the park protection zone beyond the six-month period specified in the park's authorization statute, and to enjoin DOI from including its property in the park's core area without providing funding for its acquisition.

[1] Jefferson Parish was originally also named as a defendant, but was subsequently dismissed.

CORPS' JURISDICTION UNDER THE RHA

Plaintiff claims that the Corps' actions should be invalidated because the Corps erred in asserting its jurisdiction over the levee project under Section 10 of the Rivers and Harbors Appropriations Act of 1899 ("RHA"), 33 U.S.C. § 403. The RHA prohibits any activity affecting the course, condition, location or capacity of any navigable water unless authorized by a permit issued by the Corps. Plaintiff contends that its plans did not affect "navigable waters" within the meaning of the statute or the Corps' regulations in effect at the time jurisdiction was asserted.

In regulations published on September 9 and 16, 1972, the Corps defined "navigable waters" to extend its regulatory jurisdiction in coastal areas to the line on the shore reached by the plane of the mean (average) high water. 33 C.F.R. § 209.260(k)(1)(ii). The regulations further provided that regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action even though portions of the water body may be extremely shallow, or obstructed by vegetation. 33 C.F.R. § 209.260(k)(2). The Corps asserts that federal regulatory jurisdiction under Section 10 existed in 1973 because (1) the plans called for blockage of two tidal waterbodies, Kenta Canal and Bayou Boeuf, and (2) at least some of the marshland on which the levee was built is "navigable in law" because it lies below the plane of mean high water.

Judicial precedent recognizes several tests for navigability: (1) ebb and flow of the tide, (2) connection with a continuous interstate waterway,[2] (3) navigable

[2] "Tidal waters by their very nature form a continuous water body with interstate waterways." *DeFelice*, 641 F.2d at 1175.

capacity, and (4) navigable in fact. *United States v. DeFelice*, 641 F.2d 1169 (5th Cir.) *cert. denied*, __ U.S. __, 102 S.Ct. 474, 70 L.Ed.2d 247 (1981), citing *Kaiser Aetna v. United States*, 444 U.S. 164, 170-172, 100 S.Ct. 383, 387-389, 62 L.Ed.2d 332 (1979). The ebb and flow test in this case establishes the Corps' jurisdiction over plaintiff's levee construction under Section 10.

Evidence before the Corps in 1973, and evidence presented at trial to this court, show that both Kenta Canal and Bayou Boeuf have a direct hydrological connection to the Gulf of Mexico through connecting canals, bayous, lakes, and Barataria Bay. Plaintiff's expert at trial admitted that both waterways are subject to tidal influence, experiencing a range of tide[3] of approximately 0.2 feet. For the purpose of establishing federal regulatory jurisdiction, the amount of tidal influence is irrelevant as long as a waterbody is in fact subject to the ebb and flow of the tide.

Bayou Boeuf, a natural waterway subject to tidal influence, is "navigable" for purposes of Section 10 jurisdiction. *See United States v. Lewis*, 355 F.Supp. 1132 (S.D.Ga.1973); *United States v. Cannon*, 363 F.Supp. 1045 (D.Del.1973); *United States v. Holland*, 373 F.Supp. 665 (M.D.Fla.1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). Plaintiff's failure to obtain a permit prior to blocking Bayou Boeuf constituted a violation of Section 10 of the RHA.

Plaintiff continued to rely on the opinion of the Corps' District Counsel, later overturned by the Washington, D.C. office, that although Kenta Canal was tidal,

[3] "Range of tide" is the difference between mean high tide and mean low tide.

as an artificial canal opened only at one end, it was not "navigable". The opinion of the District Counsel, subject to internal agency review, was not binding on the Corps. An agency may adjust its policies and rulings in the light of its experience. *Creppel v. U.S. Army Corps of Engineers,* 670 F.2d 564 (5th Cir. 1982).

United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), is dispositive. In *Stoeco* the court held that once artificial water bodies are connected to tidal water bodies, they become "navigable waters of the United States" by operation of law. *Stoeco,* 498 F.2d at 611. This holding was followed by the Fifth Circuit in *United States v. Sexton Cove Estates, Inc.,* 526 F.2d 1293 (5th Cir. 1976), where the Corps' jurisdiction was upheld over five canals connecting to a tidal water body, and in *United States v. DeFelice, supra,* where jurisdiction was upheld over construction of a dam across an artificial, privately owned canal, subject to tidal influence. This court finds that the Corps' assertion of jurisdiction over any obstruction of Kenta Canal, a tidal water body when the 1972 regulations were issued, was proper. Plaintiff's failure to obtain a permit prior to plugging Kenta Canal constituted a violation of Section 10 of the RHA.[4]

The Corps also asserts jurisdiction under the RHA over marshlands on the subject property which are inundated by mean high tide. 33 C.F.R. § 209.260(k)(1)(ii). Mean

[4] Evidence was presented by the federal defendants that Kenta Canal meets other tests of navigability as well. Past use in interstate commerce is suggested by evidence of cypress logging activity on Kenta Canal, but not conclusively proved. Navigable capacity under *United States v. Appalachian Power Co.,* 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940) (commerce could be made possible with artificial aid), was also suggested. In light of the tidal nature of Kenta Canal, there is no need for this court to assess the sufficiency of such evidence.

high tide is defined as the average of all high tides in a specific area measured over a lunar cycle of 18.6 years. *Id.* Construction of a levee and canal system on tidal marshes, or construction of a levee which obstructs the ebb and flow of the tide over tidal marshes, is subject to the permit requirements of Section 10 of the RHA. *Stoeco*, 498 F.2d at 611.

In October 1970 the Corps performed surveys of the subject property to establish its ground level elevation in conjunction with the federal flood insurance program. This survey showed that the surface elevations of the subject property near Louisiana State Highway 45, on the eastern boundary of the property, are about three feet above mean sea level, or three feet National Geodetic Vertical Datum ("NGVD"). NGVD is referenced to the 1929 datum, a standard plane against which elevations are established, and is simply the zero point for referencing surface elevation. The elevation steadily drops as one proceeds west from Louisiana State Highway 45 until at a distance of about 2,000 feet west of the road, the surface elevation is approximately 0.0 feet NGVD to -0.2 feet NGVD.

In 1974 the Corps calculated the level of mean high tide on the subject property to be 1.5 feet above NGVD. This level of mean high tide in areas of elevation of 1.5 feet NGVD and less indicates that the area is "navigable" under the Corps' regulations.

In 1978 the Corps discovered that the calculation of mean high tide on subject property was too high. In 1980 the tide gauge at Barataria Station, upon which the Corps had relied in calculating mean high tide to be 1.5 NGVD, was adjusted by 0.65 feet. Taking the original calculation of mean high tide at 1.5 feet and correcting for the error in

the gauge by subtracting 0.65 feet, the corrected mean high tide value at the subject property is 0.85 feet above NGVD. The corrected value also indicates that the area is tidally washed.

Federal defendants claim that plaintiff may not ask the court to invalidate the assertion of Section 10 jurisdiction based on information never submitted to the agency. Plaintiff's expert testified at trial that he knew the Corps' tide gauge must be inaccurate, but BDF never so informed the Corps. Without deciding the issue of whether the court in this case should consider the gauge inaccuracy in evaluating the propriety of the Corps' actions, *see Doyle v. United States*, 599 F.2d 984, 1000-1001, *amended In re Doyle*, 609 F.2d 990 (Ct.Cl.1979); *D.C. Transit System v. WMATA*, 466 F.2d 394, 413-414, (D.C.Cir.1972), I find that the inaccuracy makes no difference in the outcome. Whether mean high tide is assumed to be 1.5 feet NGVD or 0.85 feet NGVD, the subject property is inundated at mean high tide.

At trial plaintiff's expert, the consulting engineer for the BDF project, testified that mean high water did not inundate the subject property. In his calculations, he relied on Coast and Geodetic survey navigation charts published by the National Ocean Survey, referenced to mean low water, rather than to NGVD. It is standard practice to refer to local tide gauges to determine whether mean high tide inundates property at a given surface elevation NGVD. The Corps calculated the level of mean high tide on the subject property by using tide gauge readings from the gauge closest to the area at Barataria Station, a few miles away. Plaintiff's expert did not rely on local tide gauges to reference the mean low tide data to NGVD. I find that the procedure used by plaintiff's expert does not yield reliable

results.

Evidence presented at trial by defendants' expert in wetlands ecology and identification, Dr. R. Terry Huffman, adds further support to the finding that the area in question is tidally washed. After visiting twelve sites along the western and southern portions of the property on October 18, 1981, he testified that the soil and water in the area have a salty taste, indicating some type of tidal flushing. Watermarks and bright green duckweed on trees four inches above the water line in some channels suggest tidal fluctuation in the area. Vegetation found on the property is consistent with slightly brackish swamp or marsh. Dr. Huffman observed stunted cypress trees and the absence of juvenile regeneration at several sites, and concluded that saltwater intrusion was causing these conditions. The area is hydrologically connected with waterways that connect with the Gulf of Mexico. Dr. Huffman testified that the dikes of channels in the area are breached, permitting an uninterrupted flow of water onto the subject property, and that there is evidence of ebb and flow of water in the breaches. With the exception of the site visited near the pumping station at the southeastern extremity of the property, Dr. Huffman found the area to be subject to tidal influence.

I find that the Corps' assertion of jurisdiction over any obstruction of the tidal marshes on subject property under Section 10 of the RHA was proper. Plaintiff's failure to obtain a permit prior to constructing a levee and canal system on tidal marshland constituted a violation of federal law. 33 U.S.C. § 403.

CORPS' JURISDICTION UNDER THE FWPCA

On October 18, 1972, the Federal Water Pollution Control Act Amendments ("FWPCA") were enacted. 33 U.S.C. § 1251 et seq. (renamed Clean Water Act in 1977). Section 301(a) of the FWPCA, 33 U.S.C. § 1311(a), prohibits discharges of pollutants into the navigable waters except as authorized by permit. The Corps first proposed "interim guidance" regulating discharges of dredged or fill material into the navigable waters pursuant to Section 404 of the FWPCA on May 10, 1973 (38 Fed.Reg.12217). The Corps issued final Section 404 regulations on April 4, 1974 (39 Fed.Reg.12119). Any discharge of pollutants into navigable waters, except in compliance with the FWPCA, is prohibited. 33 U.S.C. § 1311(a). "Navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Corps' regulatory jurisdiction under the FWPCA is broader than its jurisdiction under the RHA. *Leslie Salt*, 578 F.2d at 754-755 (9th Cir. 1978); *Natural Resources Defense Council v. Callaway*, 392 F.Supp. 685 (D.D.C.1975). Under the FWPCA, the Corps has the right to control the disposal of dredged material upon freshwater as well as tidal wetlands. *American Dredging Co. v. Dutchyshyn*, 480 F.Supp. 957 (E.D.Pa.), *aff'd*, 614 F.2d 769 (3d Cir. 1979).

It is evident from the legislative history of the Clean Water Act of 1977 that Congress was aware of the Corps' interpretation of Section 404, and approved of it. The Senate Environment and Public Works Committee, in commenting on the Senate bill, stated:

> Section 404 of the Federal Water Pollution Control Act Amendments of 1972 required a permit program to control the adverse effects caused by

> point source discharges of dredged or fill material into the navigable waters including: (1) the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and (2) the contamination of water resources with dredged or fill material that contains toxic substances.
>
> The committee amendment is designed to reaffirm this intent and dispel the *wide-spread fears that the program is regulating activities that were not intended to be regulated.*

S.Rep.No. 95-370, 95th Cong., 1st Sess. (1977), at 74-75, reprinted in [1977] U.S. Code Cong. & Ad. News 4326, 4399-4400 (emphasis added).

The permit program established under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 was intended to control the degradation of aquatic resources that results from any replacement of water with fill material, as well as the degradation that results from the discharge of dredged or fill material which contains toxic substances. *See* S.Rep.No. 95-370, *supra.* 33 U.S.C. § 1362(6).

On July 19, 1977, the Corps promulgated final regulations implementing the permit programs under Section 10 of the RHA and Section 404 of the FWPCA. 42 Fed.Reg.37122, codified at 33 C.F.R. § 320-329. These regulations superseded the September 1972 Corps definition of navigable waters of the United States. They also superseded the July 25, 1975, interim final regulations, 40 Fed.Reg. 31320, promulgated in response to *NRDC v. Callaway, supra,* which invalidated the Corps 1974 regulations implementing the Section 404 permitting program

insofar as they purported to limit federal permitting jurisdiction to traditionally navigable waters. These July 1977 regulations clarified the definition of navigable waters of the United States to conform with the Corps' practice relating to permit processing. Wetlands are defined in the 1977 regulations as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 323.2(c). This definition is substantively the same as the July 1975 definition. 33 C.F.R. § 209.120(d)(2) (1976).

The area in question, with the exception of some of the ridge area along Louisiana State Highway 45, is a wetland within the regulatory definition of that term.[5]

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[5] As I have already found, defendants' expert in wetlands ecology and identification, Dr. R. Terry Huffman, visited 12 sites chosen as representative of types of topographic relief, habitat, and vegetative cover that are indicative of the overall environmental characteristics of the area in question. In almost all sites visited, Dr. Huffman, based on his education, experience, and observations, found indications of wetland hydrology, wetland soil conditions and wetland vegetation.

The soil at most of the sites visited is saturated with water. The soil is peaty, organic, mucky, and very black. The vegetation is characteristically that of wetlands, with areas of marsh containing cattails, arrowhead, and maiden cane, and areas of cypress tupelo swamp complex and floating shrub swamp with bayberry and red maple. Dr. Huffman found standing water in some areas, which after consulting with the National Weather Service about recent absence of flooding or excessive rainfall in the area, he found to be a further indication of wetland hydrology. Dr. Huffman is trained in remote sensing techniques. His examination of aerial infra-red photographs of the area taken in 1978, 1974, and 1973, together with his on-site investigation, led him to the opinion that the entire area in question, with the exception of the high ridge area, is and has been continuously since at least 1970 a wetland. This court finds that testimony persuasive.

Dr. Huffman's conclusion is supported by the administrative

The discharges of fill into the tidal wetlands in question and the discharges of dredged or fill material to dam Bayou Boeuf and Kenta Canal as part of plaintiff's levee project construction constituted discharges of pollutants into the navigable waters within the meaning of the FWPCA.

In October 1973 when the Corps' permitting authorities became aware of plaintiff's levee and canal construction activities, the Corps had the authority under the FWPCA to require plaintiff to apply for a permit. Furthermore, the Corps properly determined that the discharges of fill into the wetland area in question and into Bayou Boeuf and Kenta Canal were subject to federal jurisdiction under the FWPCA as well as under the RHA. Plaintiff's failure to obtain a permit before commencing construction of its levee and canal system violated federal law. 33 U.S.C. §§ 403, 1311(a), 1344.

THE 1979 PERMIT APPLICATION DENIAL

The court, having found that the District Engineer acted within the scope of his authority in asserting jurisdiction, next must consider whether the decision to deny the permit was arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. *Taylor v. District Engineer,* 567 F.2d 1332 (5th Cir. 1976).

In reviewing the Corps' permit denial, this court is

(Footnote 5 continued)
record, the West Bank Soil Survey prepared by the U.S. Soil Conservation Service, and the factual testimony of Calvin Patrick O'Neil and S. Dayton Mathews, both of whom also visited the site. Plaintiff presented no lay or expert evidence to refute Dr. Huffman's conclusion that the area in question is a wetland, and has been one continuously since 1970.

limited to the administrative record before the Corps at the time it made its decision in September 1979. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The standard for review of the Corps' denial of plaintiff's permit application is that provided in the Administrative Procedure Act, 5 U.S.C. § 706. The court's review is not *de novo*. The court is not empowered to substitute its judgment for that of the agency. The reviewing court must determine whether the agency considered all relevant factors, but may not reweigh the evidence. *Id.*

The July 1977 Corps regulations implementing the RHA Section 10 and the FWPCA Section 404 permit programs retain the requirement set forth in previous regulations that all applications for permits to conduct activities affecting waters of the United States be subject to a public interest review. 33 C.F.R. § 320. The factors to be considered include conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production and the general welfare. The regulations state that no permit will be granted unless it is found to be in the public interest. 33 C.F.R. § 320.4(a). Further, the regulations require the Corps to evaluate the effects of a proposed project on wetlands and state that unnecessary alteration or destruction of wetlands should be discouraged. 33 C.F.R. § 320.4(b). Proposed projects must also be evaluated with regard to their potential impact on fish and wildlife, 33 C.F.R. § 320.4(c), and upon water quality, 33 C.F.R. § 320.4(d).

The 1977 Corps regulations require the Corps to use the following criteria in evaluating permit applications:

> (i) the relative extent of the public and private need for the proposed structure or work;
>
> (ii) the desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;
>
> (iii) the extent and permanence of the beneficial and/or detrimental effects with (sic) the proposed structure or work may have on the public and private uses to which the area is suited; and
>
> (iv) the probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

33 C.F.R. § 320.4(a)(2).[6]

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[6] The Corps is also required to consider the effect on wetlands that would result from the proposed project.

> (b) Effect on wetlands. (1) Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest
>
> (2) Wetlands considered to perform functions important to the public interest include:
>
> (i) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;
>
> (ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
>
> (iii) Wetlands, the destruction or alteration of which would

The Corps' evaluation of Section 404 permit applications must also take into account the criteria incorporated

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(Footnote 6 continued)

affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands through natural water filtration processes serve to purify water.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a), above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those

into guidelines established by the Environmental Protection Agency ("EPA") pursuant to Section 404(b) of the FWPCA. *See* 40 C.F.R. § 230 (40 Fed.Reg. 41293, September 5, 1975). The EPA § 404(b) guidelines establish criteria for evaluating the water quality impacts of proposed projects.

The Corps evaluated the public comments, the comments of governmental agencies, the data generated by the Corps, and the data presented by BDF and its consultants in reviewing BDF's application. Of key concern to the Corps were the comments from the public and from other federal agencies relating to the environmental effects of the proposed work.

The area in question provides for water filtration, assists in maintaining the salinity regime for the Barataria Basin, provides habitat for terrestrial and aquatic fauna, and provides significant detritus export vital to the maintenance and health of Louisiana Gulf fisheries.

Development of the area in question and the destruction of almost 2,000 acres of wetlands would result in the loss of wildlife habitat, the loss of water purification and filtration benefits, and have significant adverse impacts on

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(Footnote 6 continued)

benefits. *In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available.* The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data on the basis of which the availability of feasible alternative sites can be evaluated.

33 C.F.R. § 320.4(b) (emphasis added).

the Barataria Bay fisheries resources due to loss of detritus contribution and habitat. After evaluating the above factors and weighing the public need against the private need for the project, as required by Corps' regulations, the District Engineer concluded that the proposed work would not be in the public interest.

Based on the evidence in the administrative record before the Corps at the time it denied plaintiff's permit application on September 17, 1979, the Corps' decision was not arbitrary or capricious, an abuse of discretion, nor otherwise not in accordance with law. The Corps considered all relevant factors. The Corps was required by regulations to consider not only the flood protection aspects of the proposed project but other factors, including water dependence of the project and ecological consequences, effect on wetlands water quality, and effects on fish and wildlife habitat. 33 C.F.R. § 320.4. The Corps may properly deny a permit on ecological grounds. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971).

The court concludes that as a matter of law, plaintiff is not entitled to "credit" for its previous illegal levee and canal construction as a factor in evaluating the 1975 permit application. When a developer proceeds with dredging operations without permission, it does so at its own peril. *Weiszmann v. District Engineer*, 526 F.2d 1302, 1305 (5th Cir. 1976); *United States v. Lewis*, 355 F.Supp. 1132, 1141 (S.D.Ga.1973); *United States v. Sunset Cove, Inc.*, 514 F.2d 1089, 1090 (9th Cir. 1975). The Corps notified plaintiff to cease its dredge and fill operation as soon as the permitting branch became aware of the work. BDF did not wait for a final determination of navigability before proceeding with its operations. Once a final determination was made, BDF

continued to assert that a permit was not necessary, submitting its application only when required to do so by the 1975 consent order. Such "self-help for the impatient" cannot circumvent enforcement of the Corps' statutory mandates. *United States v. Joseph G. Moretti*, 478 F.2d 418, 427 (5th Cir. 1973); *Weiszmann v. District Engineer*, 526 F.2d at 1305.

Nothing in the evidence presented at trial by plaintiffs suggests to the court that the decision to deny the permit was based on less than a full investigation of conditions and application of the relevant statutes to the facts adduced by the Corps.

CONSTITUTIONAL CLAIMS

Plaintiff has raised a plethora of procedural due process claims, most of which can easily be disposed of. These claims relate to the constitutionality of the Corps' regulations under the RHA and the FWPCA, the delay in processing BDF's permit application, the failure of the DOI to promulgate guidelines for the park protection zone and its authority to act in the future, the failure of Congress to appropriate funds for the acquisition of the subject property within the core area of the park, and the Corps' failure to recommend a West Bank hurricane levee placement in line with plaintiff's desires. Each issue will be discussed in turn, bearing in mind that the contemporaneous construction of an agency of a regulation it is charged with administering is entitled to deference. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Further, where an agency's interpretation of its own regulation is reasonable, it must stand even though it may not appear as reasonable as some other interpretation. *Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1208-9 *reh. denied*, 633 F.2d 582 (5th

Cir. 1980). Agency action is entitled to a presumption of validity, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C.Cir.), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 349 (1976), and statutes are presumptively valid. *Port Const. Co. v. Government of the Virgin Islands*, 359 F.2d 663 (3d Cir. 1966).

The Permit Proceedings

Arguments concerning the unconstitutionality of the Corps' application of Section 10 and Section 404 in this case are without merit. The Congressional mandate that plaintiff apply for a permit before constructing a levee on wetlands below mean high tide is a valid exercise of the constitutional Commerce Clause power. *Zabel v. Tabb*, 430 F.2d 199, 203-206 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971) (holding that the RHA is constitutional); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (holding that the FWPCA is constitutional under the Commerce Clause); *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D.Ariz.1975) (holding that the FWPCA is not unconstitutionally vague, that it does not violate ex post facto principles because of alleged uncertainty as to the extent of jurisdiction, and that the commerce power extends to control water pollution in all waters).

The regulations governing the issuance of permits under Section 10 and Section 404 are not unconstitutionally vague. They specify the applicable procedures, the criteria for the public interest review, and the factors that the Corps must consider. 33 C.F.R. §§ 320-329. Further guidance is provided by the Environmental Protection Agency's § 404(b) guidelines. The record shows that all of the elements required to be considered by the regulations

were evaluated by the Corps; the weight to be assigned each factor is properly left to the discretion of the agency. The regulations are reasonable and consistent with the intent of Congress. *Leslie Salt Co. v. Froehlke, supra.*

Absent proof of invidious arbitrary discrimination, plaintiff's charge of selective prosecution cannot be sustained. *United States v. Hercules, Inc.*, 335 F.Supp. 102 (D.Kan.1971). No such proof has been offered. In cases such as this, the United States has broad prosecutorial discretion. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977).

The long delay between the submission of plaintiff's permit application and the Corps' ruling in 1979, while unfortunate, does not rise to the level of a denial of due process. The Corps' consideration of the impact of possible effluent from plaintiff's proposed sewage treatment plant on the park, and respect for the park Administrator's request that a levee not be constructed within the park boundaries, did not exceed the Corps' statutory mandate to consider the environmental effects of the proposed project, *see Zabel v. Tabb*, 430 F.2d at 209-214, although consideration of those factors may have slowed the processing of BDF's permit application. In any event, the authority plaintiff cites in requesting that the court enjoin the permit denial, *see, e.g. Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 861-64 (4th Cir. 1961); *International Association of Machinists & Aerospace Workers v. National Mediation Board*, 425 F.2d 527, 535 n.3 (D.C.Cir.1970), supports judicial intervention only to "compel agency action...unreasonably delayed" in accordance with 5 U.S.C. § 706(1), not judicial intervention to invalidate agency action where the agency has acted in an allegedly unreasonable time. *EEOC v. Raymond Metal Products Co.*, 385 F.Supp.

907, 914 (D.Md.1974), *aff'd*, 530 F.2d 590 (4th Cir. 1976), *cited in Potomac Electric Power Co. v. Environmental Protection Agency*, 650 F.2d 509, 510 n.1 (4th Cir. 1981).

The Park

As I have said, Jean Lafitte National Historical Park was created by Act of Congress on November 10, 1978. 16 U.S.C. § 230a. The park consists primarily of the 8,000-acre core area, also referred to as the Barataria Marsh Unit, and a 12,000-acre Park Protection Zone. The statute authorizes the Secretary of the Interior to acquire the acreage comprising the core area. As to the park protection zone, uses therein are to be regulated by state and local authorities by regulations that comport with guidelines to be developed by the Secretary of the Interior in consultation with those authorities. Upon failure of local authorities to adopt or enforce regulations the Secretary *may* acquire property interests in the park protection zone to protect the values for which the core area was established. *See* Section 902(e) of the Act.

The Park Act delegates unlimited authority to acquire property interests in the core area. It is beyond dispute that the United States may take land for federal purposes by eminent domain. *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1875); *United States v. Jones*, 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015 (1883); *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893). Thus, the Park Act, as an exercise of that power, is constitutional and there is authority for the Department of the Interior to acquire the 151 acres of the area in question that are within the core area.

As to the park protection zone, the Secretary's

powers of condemnation are limited. Section 902(e) of the Park Act, 16 U.S.C. § 230a(e), makes it clear that the Secretary may not acquire property interests in the park protection zone unless state and local authorities fail to enact or enforce regulations for the use of the park protection zone, and with respect to a particular use or area, such failure threatens the core area and the values for which it was created.

The concept of a limited power of condemnation is not new with this statute. It has been used in other parks. *See, e.g.*, P.L. 90-545, as amended by P.L. 95-250, 16 U.S.C. § 79a *et seq.* [Redwoods National Park]; P.L. 92-400, 16 U.S.C. § 460aa *et seq.* [Sawtooth National Recreation Area].

From a constitutional standpoint, if local authorities regulate in the park protection zone, it is pursuant to the police power. However, no local regulations have yet been enacted; therefore, there is no constitutional issue based on any state police power authority. Any guidelines developed by the Secretary of the Interior for the park protection zone in consultation with State and local authorities would not be an exercise of the police power. Further, they would not themselves prohibit any activities in the park protection zone. Rather, they would provide the criteria pursuant to which the Secretary may exercise the limited power of condemnation in the park protection zone in the event that local regulations are not enacted or enforced. Since it is entirely speculative at this point whether any state or local ordinances will be enacted, and if enacted, how they will affect the area in question, plaintiff's claim is not ripe.

Although the Park Act provides for the Secretary of the Interior to develop guidelines in consultation with

State and local authorities within six months after enactment of the statute, the court concludes that the six month deadline is not mandatory. *Ralpho v. Bell*, 569 F.2d 607, 626-628, *reh. denied*, 569 F.2d 636 (D.C.Cir.1977); *United States v. Morris*, 252 F.2d 643, 649 (5th Cir. 1958). The provision is not intended as a limitation on power but rather as a guide for the conduct of orderly procedure, *id.*, and under the circumstances, the Department of the Interior's failure to develop guidelines is excusable. The Department of the Interior is not precluded from continuing its efforts to work with state and local authorities to develop guidelines.

As to the 151 acres, a different issue has been presented. Plaintiff alleges that there is a violation of due process where, as here, there has been only an announcement of the intention to condemn, contingent upon the availability of funds. Funds for acquisition of properties in the core area have been severely limited. In addition, the order or priority of acquisition is a discretionary matter. The slowness of the acquisition process, while perhaps unfortunate, goes neither to the authority of Congress to establish the park nor to the authority of the Department of the Interior to make acquisitions. Where the Department of the Interior has done all it can to implement the statute and its requirements, and where inability to proceed is due to a lack of Congressional authorization or appropriations, it will not be held to have failed to perform the duties imposed by the statute. *Sierra Club v. Department of the Interior*, 424 F.Supp. 172, 175 (N.D.Cal.1976). The remedy, if any, lies with Congress. *Id.*

In conclusion, the court finds that the statute creating Jean Lafitte National Historical Park is constitutional. The court further finds that the plaintiff has failed

to state a claim upon which relief may be granted with respect to the Department of the Interior's implementation of the Park Act.

The Hurricane Levee

There is no question that the Flood Control Act, 33 U.S.C. § 701, *et seq.*, is valid on its face as an exercise of the Commerce Clause power. Development and construction of flood control projects is clearly a proper activity and is related to federal authority to regulate navigable waters.

Plaintiff's claim that the failure to place a flood control levee where plaintiff would like it to be does not create a justiciable case or controversy ripe for review. *Allain-Lebreton Co. v. Department of Army*, 670 F.2d 43 (5th Cir. 1982).

In 1974 Congress amended the Flood Control Act to require the Corps, in formulating flood control plans, to employ the most economically, socially, and environmentally acceptable means of reducing or preventing flood damages. 33 U.S.C. § 701b-11(a); *Creppel v. U.S. Army Corps of Engineers*, 500 F.Supp. 1108, 1117 (E.D.La.1980), *rev'd and remanded*, 670 F.2d 564 (5th Cir. 1982). Even if the Corps did, in mid-1972, propose an alignment similar to that along which plaintiff later began construction of a levee, the Corps was not bound by that proposal. *Id.* at 572.

The Corps was, however, required to take subsequently enacted federal legislation, including the FWPCA, the amendment to the Flood Control Act, and the Park Act and regulations, into account in developing a proposal for hurricane protection on the West Bank. Even if the 1972 proposal had passed an earlier cost-benefit analysis, the

Corps could not ignore the Congressional policies expressed in subsequent legislation. Thus, the Corps has properly considered subsequent legislation, specifically that legislation relating to environmental protection and to establishment of Jean Lafitte Park, in developing a flood control proposal for the West Bank.

Development of recommendations for flood control projects is entrusted to the Corps' discretion. 33 U.S.C. § 701b-8. However, the only body with authority to make a final determination as to whether or where a flood control project will be funded and built is Congress. Flood control, dealing as it does with the regulation and flow of navigable waters, is a responsibility that devolves from Congress' Commerce Clause power. Even if this court chose to question what is clearly a rational legislative judgment, this court lacks the authority to order the Corps to build a hurricane levee along the alignment of plaintiff's incomplete levee, as plaintiff has asked the court to do.

This court finds that plaintiff has failed to present evidence entitling it to relief. Further, the court finds that the Corps has not erred either in proposing a hurricane levee alignment that does not include the entirety of the area in question or in having not yet constructed a levee.

Takings

Plaintiff's exclusive remedy for claims of uncompensated takings, through delay or otherwise, if any are present in this case, rests with the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. *American Dredging Company v. Dutchyshyn*, 480 F.Supp. 959 (E.D.Pa.), *aff'd*, 614 F.2d 769 (3d Cir. 1979). Framing the complaint as one for injunctive relief cannot defeat Court of Claims jurisdiction.

A. L. Rowan & Son v. Department of Housing, 611 F.2d 997 (5th Cir. 1980). Because plaintiff has an adequate remedy at law for money damages if, indeed, any taking of plaintiff's property has occurred, injunctive relief is not appropriate in this case. *Regional Rail Reorganization Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

PETITIONER'S COMMENTS ON DISTRICT COURT OPINION

The findings of fact of the District Court are generally correct. However, there are some errors as noted below. References are made to the page of the reported decision.

Page 1029—The Court refers to "one of the sites" recommended by the Corps. The Court is confused. In 1972, only one site was recommended. Subsequently in 1978, after the determination of the boundary of the Park Protection Zone and its co-existence with the levee line became relevant, some 14 sites were recommended, of which approximately 7 involved the existing levee line. After the Parish of Jefferson reversed itself and endorsed the line on which the Bayou des Familles levee had been built for purely economical reasons (because it would not have to pay for the base of the levee or for the land), Col. Sands, the then District Engineer, declared that this decision was solely his and that he had chosen the line which formed the boundary of the Park Protection Zone.

Page 1030—The Court states that Chatry advised that "some of the hurricane requirements had been met." This, too, is an understatement, as you will see from Chatry's letter which is a part of this record as Appendix B, Item 4.

The Court failed to note, although it was emphasized on several occasions, that with his communication to the Corps of Engineers on August 20, 1973, the Director of Sanitation of the Parish of Jefferson had sent the Corps of Engineers a copy of the Bayou des Familles plans, and further failed to recognize that these plans had been sent to the permit department by a copy of the October 7th letter from Farmer to Condon, by the copy to C. W. Decker who was in charge of permits.

Also at Page 1030, the Court adopts Col. Hunt's (the then District Engineer) position that he first became aware of this as a result of an inspection, and does not take note that Col. Hunt knew or should have known through his department, that the Corps of Engineers had been advised as early as August, 1973 of the work on the Bayou des Familles levee.

Also at Page 1030, the Court refers to the correspondence whereby Bayou des Familles Development Corps' counsel agreed not to block Bayou Boeuf. There seems to be some confusion that Bayou Boeuf has been blocked. If so, it is also a fact that Bayou des Familles had no knowledge of this at the time of the correspondence with Col. Hunt or during the hearing.

Page 1023—The Court infers that the Kenta Canal has been plugged. This is not a fact. The Kenta Canal has never been plugged. This is shown by the position of the Corps of Engineers that it is considering granting the Parish of Jefferson the right to use this levee line, provided there are flood gates installed at the Kenta Canal.

Page 1035—In consideration of the CWA, the Court completely ignored the exemption which was relied upon

by the Corps itself in the *Orleans Audubon* case.

Page 1039—We suggest that the Court here, as we have stressed in argument, completely missed the point of the constitutional arguments made by the Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3700

D. C. Docket No. CA-79-4324-E

BAYOU des FAMILLES
DEVELOPMENT CORPORATION,
Plaintiff-Appellant,

versus

UNITED STATES CORPS OF ENGINEERS,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana

Filed Aug. 19, 1983

Before CLARK, Chief Judge, GOLDBERG and POLITZ,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-

appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1983

ISSUED AS MANDATE: Aug. 18, 1983

Date of Entry, Aug. 22, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3700

BAYOU des FAMILLES
DEVELOPMENT CORPORATION,
Plaintiff-Appellant,

versus

UNITED STATES CORPS OF ENGINEERS,
ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(AUGUST 8, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

IN REPLY REFER TO
LMNPL-L 9 October 1973

SUBJECT: Reevaluation of Base Flood Elevations in Reaches 4 and 5 of the Flood Insurance Study Jefferson Parish Unincorporated, Louisiana, Harvey Drainage Area West Bank of Jefferson Parish

THRU: Division Engineer, Lower Mississippi Valley
ATTN: LAVTD-M

TO: HQDA (DAEN-CNP-F)
WASH DC 20314

1. References inclosed:

a. Copy of letter dated 30 July 1973, Mr. Ray L. Condon, Jr., Director, Jefferson Parish Department of Drainage and Sewerage, subject, "
unincorporated area of Parish of Jefferson, Westbank."

b. Copy of letter dated 21 August 1973, Mr. Ray L. Condon, Jr., Director, Jefferson Parish Department of Drainage and Sewerage, subject, "Harvey Drainage Area West Jefferson Parish."

2. The subject reevaluation requested by the Federal Insurance Administration has been completed and results are furnished herein.

3. The interior levee along Cousins Canal (see Plate 30, inclosure 3) has recently been degraded, consequently under present conditions the base flood elevation for Reach 5 is 4.2 feet mean sea level (m.s.l.). At present that portion of Zone A5 known as Harvey Drainage Area, with the first

lift of the Corps of Engineers' levee along Harvey Canal completed and the Cousins Canal pumping station operating, is provided with 40-year protection against hurricane-produced tides. A rainstorm with a recurrent frequency of once in 100 years could produce a stage of 1.9 feet m.s.l. in Reach 5. However, within the Harvey Drainage Area, when the storm drainage is completed and connected with the Cousins Canal pumping station the stage of 100-year rainfall will be reduced to 1.6 feet m.s.l. This work should be completed within the next six months.

4. Degrading of the interior levee along Cousins Canal incorporated a portion of the area originally in Reach 4 into Reach 5. This area is now served by the new drainage pumping station located on Cousins and Harvey Canals.

5. The Bayou Des Familles levee on the west side of Barataria Highway (see inclosure 5) is under construction by private interests, however, the completion date is not known at this time. If this levee is built to the grade of 7-8 feet m.s.l. as specified in the construction drawings with a cross section adequate to insure its integrity and is properly maintained, then Reach 5 will be provided protection against hurricane-produced stages on the order of once in 100 years or better. When the levee is completed, the flood stages produced by a 100-year frequency hurricane will be reduced from 4.2 feet m.s.l. resulting from tides to 1.6 feet m.s.l. resulting from rainfall only.

6. Three sets of preliminary prints of revised flood insurance zone maps and corresponding elevation-frequency curves covering subject area are inclosed, one set of which is to be retained by DNV.

7. Copies of the revised maps and elevation frequency

curves will be available at a later date.

8. A copy of this letter with inclosures has been furnished Mr. Ray Condon, Director of Jefferson Parish Department of Drainage and Sewerage.

FOR THE DISTRICT ENGINEER:

FREDERIC M. CHATRY
Acting Chief, Planning Division

5 Incl (trip) BAEHR
1. Copy of letter dated 30 July 1973 LMNED
2. Copy of letter dated 21 August 1973
3. Flood insurance zone maps DECKER
—Plates 17, 24, 25, 30 & 34 LMNOD-S
4. Frequency curves—Reaches 4 & 5
5. Levee location map KING
LMNDE-E

CF: (w/basic + incl)
Mr. Ray Condon CHATRY
Mr. C. Krebs (picked up) LMNPL
Mr. Earl Moss (sent by transmittal slip dated 9 Oct. 73)

CARD NO. 0338

LMNOD-SP (Jefferson Parish Wetlands)19

Permit Application by Bayou Des Familles Development Corporation

District Engineer C/Operations Div 10 Dec 75
Mr. Decker/ga/264

1. All comments on the above application and draft EIS have been received. Planning Division has begun the process of preparing the final EIS.

2. It is apparent that the decision on the issuance of a permit and the decision on the West Bank Hurricane Protection project are closely related. In fact, the decisions should be made in concert.

3. If a decision is made to deny the permit application, it would be inconsistent to propose a Corps levee in the same area. If we propose to build a hurricane levee near the alinement of the Bayou Des Familles levee, there is no reason why a permit should not be issued.

4. In our opinion, there is sufficient information available now to support a recommendation for denial without preparing the final EIS. It is also possible to foresee a recommendation for issuance of the permit if we will, in the near future, construct a hurricane protection levee in the area.

5. We, therefore, propose that representatives of Operations Division, Planning Division and Counsel meet with you or LTC Hubert, thoroughly discuss the matter, review

all available information, determine the probability that a hurricane protection project will encompass the Bayou Des Familles area and base further actions on the permit matter on that determination.

6. If it is apparent that denial of the permit will be recommended, we cannot see any value in expending the time of our personnel in preparing the final EIS and in delaying the final determination of permit issuance or denial if a finding can be made now.

7. Strong opposition to issuance of the permit has been expressed by EPA, MMFS, USF&WS, the State Parks and Recreation Commission, and the State Planning Office. It is probable that these same agencies will also oppose a hurricane levee which destroys the wetlands of this area.

NETTLES

CF:
LMNPL
LMNPL-R
LMNPL-RE
LMNPL-F
LMNOC

A-54

P.O. Box 429, Arabi, Louisiana 70032

W38 March 28, 1979

Memorandum

To: Regional Director, Southwest Region

From: Superintendent, Jean Lafitte

Subject: Section 902(b) & (c), PL 95-625 Guidelines on criteria for use and development in the park protection zone

Section 902(c) limits the purpose of these guidelines to the preservation of certain values within the "core" area of the Park. We need not, therefore, suffer long with the delusion that the park protection zone is, or can become an effective extension of the Park under the existing legislation. Even under Section 902(e), which provides for our acquisition of properties in the protection zone if all else fails, limits that acquisition to the interest necessary to achieve the prescribed degree of protection for the "core" area.

Section 404 of the Federal Water Pollution Control Act, and the regulations promulgated to implement it, appear to effectively protect the wetlands in the protection zone from development requiring dredging or filling. This condition will prevail as long as the wetlands remain such and the only activity that has the potential for altering that condition is the hurricane protection program under study by the Corps of Engineers. The location of the levees and pumping stations for this system has been, and will continue to be controversial. Whatever the Corps study and the politics trend toward as a location for levees, etc., I'm convinced that we can effectively keep them out of the protection

zone. The political climate is controlled by two factions at the moment. One is the proposed water line to the town of Lafitte which EPA is holding up until the Parish establishes a growth limit line, which becomes their preferred location for the hurricane protection levee. The second is a growing public clamor for flood protection in developed, developing and undeveloped existing dryland areas. Both of these are persuading the Parish Council to cooperate with any endeavor that will speed a decision and the construction of the flood protection system. The only counter to this trend is coming from owners of property in the wetlands area that will probably remain outside the protective levees. Many of these were speculative acquisitions by corporations and individuals involving large loans, heavy interest payments and pre-dating the present public, political and legal climate relative to wetlands. Where the flood protection system excludes these areas the investors will find themselves without a market and with literally no opportunity to develop one.

This is the genisis of the current effort of the Parish Council to initiate, through Senator Johnston and Representative Boggs, additional legislation to expand the fee acquisition area of Jean Lafitte National Historical Park to include the park protection zone. We would become the market. If this plan fails, and based on early reaction from the Congressional staffs it appears that it will, the next scenario will probably involve a concerted effort to force our hand toward acquisition under Section 902(e). This scenario would almost of necessity involve degradation of wetland, if not parkland resources. It would probably ultimately succeed with the net effect of causing us to pay higher prices for less valuable park land. The spectre of this scenario developing to its climax persuades me to support the current Parish effort to modify the legislation albiet an

admitted long shot.

In the interim, we are required by the legislation to develop the guidelines and criteria for development and use of property in the park protection zone. Following are the guidelines I have drafted and propose to begin discussing with State and local officials shortly after April 1.

1. The alteration of existing drainage patterns, or natural water movement, whether in or out of channels, whether perennial or seasonal, is not permitted.

2. The introduction of any pollutant from any source, regardless of the degree of treatment is not permitted.

3. The discharge of concentrated storm run-off into either the park protection zone, or the "core" area of the park is not permitted.

4. During construction and operation of any development occuring within the park protection zone, or its watershed, no sediment, or chemicals from any source will be permitted to escape into the aquatic ecosystem of the park protection zone, or the "core" area of the park. This includes, but is not limited to, road surfacing chemicals, petroleum products, fertilizers, pecticides, herbicides, dust, leachades from waste piles, etc.

5. In recognition of the limited size of the "core" area, its accessability via several waterways and its interrelationship with the protection zone, a moratorium on leasing and development of fishing, recreation or trapping camps is hereby established pending the completion of the general management plan for the Park.

6. Anti-litter ordinances will be reviewed, strengthened as appropriate, and enforced by Jefferson Parish and National Park Service officials throughout the "core" and protection zone.

7. Owners of existing camps will be required to haul out refuse.

8. While the exploration for and development of oil and gas resources within the Park is envisioned by the legislation the spirit of these guidelines relative to impacts on natural water movement, discharge of waste materials, escape of chemicals and litter is also applicable to these activities.

Your early review and comment on these proposed guidelines would be appreciated. Telephone conversations with anyone interested would also be welcome.

James L. Isenogle

cc: DSC
WASO (Attn. Eldon Reyer)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORLEANS AUDUBON SOCIETY, ET AL — CIVIL ACTION

NO. 81-2248

VERSUS

SECTION "D"

COLONEL ROBERT C. LEE, ET AL

ORDER

In this action, the Orleans Audubon Society and the Ecology Center of Louisiana (Plaintiffs) and Intervenor, Sierra Club, seek to overturn the decision of officials of the United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) not to require Intervenor, CIT Corporation (CIT), to obtain individual permits under Sections 9 and 10 of the Rivers and Harbors Appropriations Act of 1899 (RHA), 33 U.S.C. 401, 403, and Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344. Plaintiffs contend that the failure of the named officials to require individual permits was arbitrary and capricious and an abuse of discretion. One of the Motions before the Court is Plaintiff's Motion for Partial Summary Judgment declaring the installation of two culverts in a parcel of land owned by CIT to be illegal and requiring Defendant, the Corps, to require CIT to apply for a Section 404 Clean Water Act permit and further ordering Intervenor, CIT, to remove the culverts in question and restore the levees to their condition prior to the culvert installation.

Federal Defendants and Intervenor, CIT, oppose Plaintiffs' Motion for Partial Summary Judgment and further seek to have Plaintiffs' Complaint dismissed or in the

alternative, to have summary judgment granted in Federal Defendants' favor. All of these Motions came on for hearing on a former date and now, after consideration of the record herein, the memoranda submitted and argument of counsel, the Court rules as follows:

1. FACTS

The subject of this litigation is a tract of land of approximately 466 acres located west of the Mississippi River in Jefferson Parish, Louisiana. The land is primarily a tupelo gum swamp. In 1972, the predecessor in title to CIT, the current owner, constructed levees around the property. In 1976, Colonel E. J. Rush, then the District Engineer for the New Orleans District of the Corps, issued a cease and desist order to the predecessor in title and directed that he apply for an after-the-fact permit for the work in question. CIT acquired the tract in 1977 through foreclosure and on June 1, 1977, applied for the after-the-fact permit as its predecessor had been directed to do. Subsequent thereto, Colonel Thomas Sands succeeded Colonel Rush as District Engineer of the New Orleans District and, after inquiry from counsel for CIT concerning whether the Corps had properly asserted Federal Regulatory Jurisdiction over the activities that were the subject of the after-the-fact permit application and, after a thorough review and analysis, concluded and so advised counsel for CIT on June 21, 1979, that the Corps did not have jurisdiction requiring an individual permit and that the Corps now declined to exercise discretionary authority to require such a permit because in the Corps' opinion, the activities in question were authorized under a nationwide permit set forth in 33 CFR 322.4(g) and 33 CFR 323.4-1(a). Plaintiffs' challenge this action by Colonel Sands in not requiring CIT to obtain the after-the-fact permit.

In 1979, certain gaps in the levee system were discovered and the Corps concluded that no individual permit was required for repair of the gaps. Plaintiffs protest that decision too and in January 1980 sent the Corps and EPA a letter advising of their intention to sue under Section 505 of the CWA, 33 U.S.C. 1365.

In 1980 and 1981, CIT installed drainage culverts through the levee enclosing the swamp in question and again Plaintiffs protested and urged the Corps to require CIT to obtain a permit under the applicable provisions of the Clean Water Act. The Corps, after consultation with the EPA, concluded it did not have authority to regulate the activity in question and that the activities were authorized by nationwide permit.

In the instant litigation, Plaintiffs seek declaratory and mandatory injunctive relief and urge this Court to order the Corps and EPA to require CIT to apply for individual permits under Section 10 of the RHA and Section 404 of the CWA. Intervenor Sierra seeks the same relief.

2. STANDARD OF REVIEW

At the outset, this Court must consider the applicable legal standard in reviewing the decision of the Corps not to require an individual permit for work in question. Whether or not this Court agrees with the decision of the Corps is of no moment.

> "***the Court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment...although this inquiry into the facts is to be searching and careful, the ultimate standard

of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971)

Only if the Court finds that the Corps' decision was arbitrary, capricious, or in abuse of discretion may this Court order remedial action. Indeed, the decision of the agency is presumed to be correct. *United States v. City of Chicago*, 400 U.S. 8 (1970). In considering whether or not the action of the Corps or the action of the EPA was arbitrary, this Court must look to the record before those agencies when their decisions were reached; *Camp v. Pitts*, 411 U.S. 138 (1973).

Furthermore, because the decision of the Corps whether or not to require the individual work permits is clearly a discretionary function, the relief of mandamus would not be available to Plaintiffs. Only if this Court found that the Corps had in fact arbitrarily failed to make a required discretionary decision could Plaintiffs be afforded any relief. And in that case, the relief to be afforded would be a remand to the Corps to require them to make the discretionary decision but without direction as to how that discretion should be exercised. In the case at bar, the Corps, after careful consideration, chose not to require individual permits for the activities in question because the regulatory guidelines, 40 CFR 230 (1975) were not applicable to the activities in question and the activities in question were authorized by nationwide permit. Thus, the issue before this Court is whether or not the Corps, after consultation with the EPA, abused its discretion in reaching that decision.

At oral argument, counsel for Plaintiffs, while initially suggesting that perhaps the record of the Corps filed with the Court might not be complete, later conceded that the Court had at least "99 percent of it" and that if he became aware of any additional relative documents he would bring them to the Court's attention. No additional documents have been filed with the Court since oral argument. Additionally, at oral argument, counsel for Plaintiffs advised the Court that the Court had before it the required documents on which decisions on the various Motions could be made.

After carefully reviewing the relevant documents, this Court finds that the discretionary decisions of the EPA and the Corps are not arbitrary and capricious and do not reflect an abuse of the discretion granted to those agencies.

Accordingly, the Motion of Plaintiffs for Partial Summary Judgment should be and is hereby DENIED and the Motions of Defendants and Intervenor, CIT Corporation, to Dismiss or alternatively for Summary Judgment, are GRANTED and this suit is dismissed at Plaintiffs' costs.

New Orleans, Louisiana, this 29th day of March, 1983.

UNITED STATES DISTRICT JUDGE

Subject body of water is an artificial canal which flows into Bayou Barataria at its southern end and terminates on privately-owned property at the northern end. The existence of past interstate commerce is alluded to in a letter by the conservation chairman of Orleans Audubon Society (Exh. 1). Therein it is alleged that log floating operations were undertaken around 1910. Research has failed to uncover substantiation for this position. It cannot be ascertained whether single logs were floated at that time or whether floating rafts were transported thereon. No sufficient information exists to determine if, in fact, these logs ever entered interstate commerce or if they were transported solely in furtherance of intrastate trade. It has been orally reported by a representative of a local drainage department that, presently, trappers carry out their activities throughout the entire extent of the canal. This report is unsubstantiated by affidavit or by other concrete support. Moreover, it is questionable that travel on a body of water for purposes of private fishing, hunting, and trapping qualifies as interstate commerce. Most cases hold such activity does not constitute sufficient basis for a finding of federal jurisdiction. See *George v. Beavark, Inc.* 402 F.2d 977 (8th C.A. 1968)-admiralty case; see also *State by Burnquist v. Bollenbach*, 63 N.W. 2d 278.

As a general rule, the character of commerce essential to navigability is that which is useful and has practical utility to the public. There has been no showing that the use of Kenta Canal meets this test. ER 1165-2-302 §8a provides in pertinent part that "...A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce." Information contained in subject report fails to lend adequate support to a

conclusion that interstate commerce is presently sustained on Kenta Canal. Consequently, there is no justification for asserting federal jurisdiction over the waterway. ER 1165-2-302 §12b states inter alia that regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action..." That regulation cannot be cited as authority for asserting jurisdiction over subject waterway since this rule excepts from its scope artificial canals opened at only one end.

JOSEPH A. TOWERS
District Counsel